

AMENDED IN ASSEMBLY JUNE 10, 2003

AMENDED IN SENATE MAY 13, 2003

AMENDED IN SENATE MARCH 18, 2003

SENATE BILL

No. 12

Introduced by Senator Bowen

**(Coauthors: Senators Ducheny, Kuehl, Machado, Ortiz, Perata,
Romero, Scott, Soto, Torlakson, and Vasconcellos)**

(Coauthors: Assembly Members Chan, Hancock, Jackson, *Leno*,
Leslie, Longville, Nation, Pavley, Vargas, ~~and Wolk~~ *Wolk, and Yee*)

December 2, 2002

An act to amend Section 17538.45 of, to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, and to repeal Section 17538.4 of, the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

SB 12, as amended, Bowen. Electronic mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on all unsolicited e-mailed documents, as specified, and prohibits the e-mailing of any unsolicited documents to a person who

has requested not to receive any further unsolicited documents. Existing law requires unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT,” as specified.

This bill would delete these provisions and would instead prohibit a person or entity from initiating an unsolicited commercial e-mail advertisement either from California or to a California electronic mail address. The bill would also make it unlawful for a person or entity to collect ~~electronic mail addresses posted on the Internet, or to sell or provide a list of e-mail addresses, to be used to initiate~~ *or use electronic mail addresses or to establish multiple electronic mail accounts for the purpose of initiating* the transmission of unsolicited commercial e-mail advertisements from California or to a California e-mail address.

This bill would prohibit a person from initiating transmission of a commercial e-mail advertisement either from California or to a California e-mail address where the advertisement (1) contains or is accompanied by a 3rd party’s domain name without permission, (2) contains or is accompanied by falsified, misrepresented, obscured, or forged header information, or (3) has a misleading subject line.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of any of these provisions to bring an action to recover the greater of actual damages or \$500 per individual violation, and reasonable costs and attorney’s fees. The bill would also impose a civil penalty of \$250 for each individual violation, to be paid to the High Technology Theft Apprehension and Prosecution Program Trust Fund. The bill would authorize the court to increase the award to up to triple this amount if the violation was willful or knowing. The bill would provide that any cause of action in existence prior to its enactment would not be affected by the act and would be governed by the law in effect at the time it arose.

Existing law prohibits a registered user of an electronic mail service provider, as defined, from using or causing to be used the provider’s equipment located in this state in violation of the provider’s policy prohibiting or restricting the use of its equipment for the initiation of unsolicited electronic mail advertisements. Existing law prohibits an individual, corporation, or other entity from using or causing to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider’s equipment located in this state in violation of the provider’s policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users. Existing law authorizes an electronic mail service provider



whose policy is violated to bring a civil action to recover specified damages, but requires the provider to establish as an element of the cause of action that the defendant had actual notice, prior to the violation, of the provider's policy and that the advertisements would use or cause to be used the provider's equipment located in this state.

This bill would delete the above prohibitions and instead prohibit a person who has been given notice by an e-mail service provider of its policies regarding unsolicited commercial e-mail—~~advertisements~~ *advertisements* from using a computer, computer network, or the computer services of the provider to initiate the transmission of an unsolicited commercial e-mail advertisement from California or to a California e-mail address in violation of those policies. The bill would also delete the requirement that a provider bringing an action for a violation of its policies establish that the defendant had actual notice, prior to the violation, of the provider's policies and that the advertisements would use, or cause to be used, the provider's equipment located in this state.

A violation of the provisions governing advertising is a misdemeanor. Because a violation of the provisions of this bill would be a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Article 1.8 (commencing with Section 17529)
2 is added to Chapter 1 of Part 3 of Division 7 of the Business and
3 Professions Code, to read:

4
5 Article 1.8. Restrictions on Unsolicited Commercial E-Mail
6 Advertisement
7

8 17529. For the purpose of this title, the following definitions
9 apply:



1 (a) “California electronic mail address” means any of the
2 following:

3 (1) An electronic mail address furnished by an electronic mail
4 service provider that sends bills for furnishing and maintaining
5 that electronic mail address to a mailing address in this state.

6 (2) An electronic mail address ordinarily accessed from a
7 computer located in this state.

8 (3) An electronic mail address furnished to a resident of this
9 state.

10 (b) “Commercial e-mail advertisement” means any electronic
11 mail message initiated for the purpose of advertising or promoting
12 the lease, sale, rental, gift offer, or other disposition of any
13 property, goods, services, or extension of credit.

14 (c) “Direct consent” means that the recipient has expressly
15 consented to receive the message, either in response to a clear and
16 conspicuous request for the consent or at the recipient’s own
17 initiative.

18 (d) “Domain name” means any alphanumeric designation that
19 is registered with or assigned by any domain name registrar as part
20 of an electronic address on the Internet.

21 (e) “Electronic mail” or “e-mail” means an electronic
22 message that is sent to an electronic mail address and transmitted
23 between two or more telecommunications devices, computers, or
24 electronic devices capable of receiving electronic messages,
25 whether or not the message is converted to hard copy format after
26 receipt or is viewed upon transmission or stored for later retrieval.
27 “Electronic mail” or “e-mail” includes electronic messages that
28 are transmitted through a local, regional, or global computer
29 network.

30 (f) “Electronic mail address” means a destination, commonly
31 expressed as a string of characters, to which electronic mail can be
32 sent or delivered. An “electronic mail address” ~~may include~~
33 *consists of* a user name or mailbox and a reference to an Internet
34 domain.

35 (g) “Electronic mail service provider” means any person,
36 including an Internet service provider, that is an intermediary in
37 sending or receiving electronic mail or that provides to end users
38 of the electronic mail service the ability to send or receive
39 electronic mail.



(h) “Header information” means the source, destination, and routing information attached to the beginning of an electronic mail message, including the originating domain name and originating electronic mail address.

(i) “Initiate the transmission of a commercial e-mail advertisement” means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses to which the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic mail service provider through its network or system.

(j) “Internet” has the meaning set forth in paragraph (6) of subdivision (f) of Section 17538.

(k) “Preexisting or current business relationship,” as used in connection with the sending of a commercial e-mail advertisement, means either of the following:

(1) That within the three-year period ending upon receipt of the advertisement, the recipient has made an inquiry, application, purchase, or transaction regarding products or services offered by the sender.

(2) That the recipient has made an inquiry, application, purchase, or transaction regarding products or services offered by the sender and the sender maintains an electronic or written record of the *inquiry, application, purchase, or transaction*.

(l) “Recipient” means the authorized user of the electronic mail address to which the message was sent or delivered. If a recipient of a commercial e-mail advertisement has one or more electronic mail addresses to which a commercial e-mail advertisement is sent, the recipient shall be deemed to be a separate recipient for each address to which the advertisement is sent.

(m) “Routine transmission” means the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process.

(n) “Sender” means a person or entity who initiates the transmission of a commercial e-mail advertisement or whose product, service, or Internet Web site is advertised or promoted by the message. A sender does not include a person or entity whose product, service, or Internet Web site is contained in, or accompanied by, a commercial e-mail advertisement initiated by

1 a third party where the third party has not obtained authorization
2 from the person or entity to advertise the person or entity's
3 product, service, or Internet Web site.

4 (o) "Unsolicited commercial e-mail advertisement" means a
5 commercial e-mail advertisement sent to a recipient who meets
6 both of the following criteria:

7 (1) The recipient has not provided direct consent to receive the
8 commercial e-mail advertisement.

9 (2) The recipient does not have a preexisting or current
10 business relationship with the sender or offeror of the property,
11 goods, or services.

12 If a recipient has either provided direct consent or has a
13 preexisting or current business relationship with the sender,
14 commercial e-mail advertisements from that sender shall not be
15 construed as unsolicited commercial e-mail advertisements.

16 17529.1. Notwithstanding any other provision of law, no
17 person or entity may do either of the following:

18 (a) Initiate an unsolicited commercial e-mail advertisement
19 from California.

20 (b) Initiate an unsolicited commercial e-mail advertisement to
21 a California electronic mail address.

22 17529.2. (a) It is unlawful for any person or entity to initiate
23 the transmission of a commercial e-mail advertisement either from
24 California or to a California electronic mail address under any of
25 the following circumstances:

26 ~~(a)~~

27 (1) The commercial e-mail advertisement contains or is
28 accompanied by a third party's domain name without permission
29 of the third party.

30 ~~(b)~~

31 (2) The commercial e-mail advertisement contains or is
32 accompanied by falsified, misrepresented, obscured, or forged
33 header information.

34 ~~(c)~~

35 (3) The commercial e-mail advertisement has a subject line that
36 has the capacity or tendency to mislead the public about the
37 contents of the advertisement.

38 (b) *It is not a violation of paragraph (1) or (2) of subdivision*
39 *(a) to use a third party's domain name if the third party has given*
40 *permission for its use by the user.*

1 17529.3. (a) It is unlawful for any person or entity to collect
2 electronic mail addresses posted on the Internet if the purpose is
3 for the electronic mail addresses to be used by a sender to do either
4 of the following:

5 (1) Initiate the transmission of unsolicited commercial e-mail
6 advertisements from California.

7 (2) Initiate the transmission of unsolicited commercial e-mail
8 advertisements to a California electronic mail address.

9 (b) It is unlawful for any person or entity to sell or otherwise
10 provide a list of electronic mail addresses to be used by a sender
11 to do either of the following:

12 (1) Initiate the transmission of unsolicited commercial e-mail
13 advertisements from California.

14 (2) Initiate the transmission of unsolicited commercial e-mail
15 advertisements to a California electronic mail address.

16 (c) *It is unlawful for any person to use an electronic mail*
17 *address obtained by using automated means based on a*
18 *combination of names, letters, or numbers to do either of the*
19 *following:*

20 (1) *Initiate the transmission of unsolicited commercial e-mail*
21 *advertisements from California.*

22 (2) *Initiate the transmission of unsolicited commercial e-mail*
23 *advertisements to a California electronic mail address.*

24 (d) *It is unlawful for any person to use scripts or other*
25 *automated means to establish multiple electronic mail accounts*
26 *from which to do, or to enable another person to do, either of the*
27 *following:*

28 (1) *Initiate the transmission of unsolicited commercial e-mail*
29 *advertisements from California.*

30 (2) *Initiate the transmission of unsolicited commercial e-mail*
31 *advertisements to a California electronic mail address.*

32 17529.4. (a) In addition to any other remedies provided by
33 this article or by other provisions of law, a recipient of a
34 commercial e-mail advertisement transmitted in violation of
35 Section 17529.1, 17529.2, or 17529.3 may bring an action to
36 recover either actual damages or five hundred dollars (\$500) for
37 each individual violation, whichever is greater, and may also
38 recover reasonable costs and attorney's fees.

39 (b) If the court finds that the violation was willful or knowing,
40 the court may, in its discretion, increase the amount of the award

1 to an amount equal to not more than three times the amount
2 available under subdivision (a).

3 (c) In addition to the award set forth in subdivisions (a) and (b),
4 a civil penalty of two hundred fifty dollars (\$250) shall be imposed
5 for each individual violation, to be paid to the High Technology
6 Theft Apprehension and Prosecution Program Trust Fund, which
7 may be expended by the Office of Criminal Justice Planning to
8 fund programs to enhance the capacity of local law enforcement
9 and prosecutors to deter, investigate, and prosecute high
10 technology related crimes.

11 (d) A person or entity shall not be found to have violated this
12 article if, in attempting to comply with this article, the person or
13 entity relies on information provided by a recipient, or prospective
14 recipient, who has expressly disclosed that he or she is not a
15 California resident.

16 (e) It shall be an affirmative defense in any action brought
17 under this article that the defendant has established and
18 implemented, with due care, reasonable practices and procedures
19 to effectively prevent violations of this article.

20 (f) No person or entity shall have a cause of action against an
21 electronic mail service provider only involved in the routine
22 transmission of the commercial e-mail advertisement or
23 unsolicited commercial e-mail advertisement sent in violation of
24 this article.

25 17529.9. The remedies provided for in this article are in
26 addition to, and not in lieu of, any other remedies provided for by
27 law.

28 SEC. 2. Section 17538.4 of the Business and Professions
29 Code is repealed.

30 SEC. 3. Section 17538.45 of the Business and Professions
31 Code is amended to read:

32 17538.45. (a) The definitions set forth in Section 17529
33 apply to this section.

34 (b) No person shall use a computer, computer network, or the
35 computer services of an electronic service provider to initiate the
36 transmission of an unsolicited commercial e-mail advertisement
37 from California or to a California electronic mail address in
38 violation of the policies established by an electronic mail service
39 provider if the electronic mail service provider has provided the
40 person with notice of those policies. For the purpose of this



subdivision, notice of the electronic mail service provider's policies regarding the transmission of unsolicited commercial e-mail advertisements shall be deemed sufficient if the electronic mail service provider maintains an accessible Web page setting forth those policies and provides notice via electronic means between the sending and receiving computers.

(c) An electronic mail service provider shall not be required to create a policy prohibiting or restricting the use of its equipment for the initiation or delivery of unsolicited commercial e-mail advertisements.

(d) Nothing in this section shall be construed to limit or restrict the rights of an electronic mail service provider under Section 230(c)(1) of Title 47 of the United States Code, or any decision of an electronic mail service provider to permit or to restrict access to or use of its system, or any exercise of its editorial function.

(e) (1) In addition to ~~an other~~ *another* action available under law, any electronic mail service provider whose policy on unsolicited electronic mail advertisements is violated as provided in this section may bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of fifty dollars (\$50) for each electronic mail message initiated or delivered in violation of this section, whichever amount is greater, up to a maximum of twenty-five thousand dollars (\$25,000) per day.

(2) In any action brought pursuant to paragraph (1), the court may award reasonable attorney's fees to a prevailing party.

(3) A violation of this section shall not be subject to Section 17534.

SEC. 4. Any cause of action that is in existence before the effective date of this act shall not be affected by this act, but shall instead be governed by the law that was in effect at the time the cause of action arose.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within



- 1 the meaning of Section 6 of Article XIII B of the California
- 2 Constitution.

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